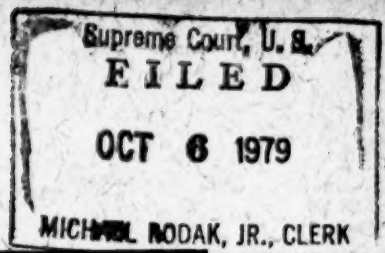


No. 79-269



In the Supreme Court of the United States

OCTOBER TERM, 1979

LORI CHRISTINE LORENZ, ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioners contend that the district court improperly dismissed their claim for damages against the United States under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, without an evidentiary hearing.

1. On January 10, 1975, Timothy J. Lorenz and several friends began a weekend camping and motorcycle riding trip on land owned by the United States in San Bernardino County, California. The next morning, Lorenz and his companions started exploring the area on their motorcycles. After riding among the sand dunes, the group travelled along a dirt road. Subsequently, Lorenz left the road and drove his motorcycle on the open desert paralleling the road. Unfortunately, Lorenz drove his motorcycle into an open mine shaft, some 20 feet from the edge of the road, and was killed (Complaint paras. 3-5; Pet. 4-5).

Petitioners, the decedent's wife and daughter, thereafter filed suit in the United States District Court for the Central District of California under the Federal Tort Claims Act. They alleged that the United States was negligent in failing to maintain properly the shoulders of the road or to give adequate warning to Lorenz. The United States moved to dismiss the complaint on the grounds that, in light of the California recreational use statute (Cal. Civ. Code § 846 (West Cum. Supp. 1979)), petitioners had failed to state a claim upon which relief might be granted. That statute provides in pertinent part:

An owner of any estate in real property owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section * * *.

The district court granted the government's motion (Pet. App. 1).

On appeal, petitioners argued for the first time that a conclusory assertion¹ in their complaint brought them within an exception to Section 846, regarding "willful or malicious failure to guard or warn against a dangerous condition * * *."² The court of appeals rejected peti-

¹The pertinent portion of the complaint stated (Pet. 5):

The death of the plaintiffs' decedent was the further result of the willful failure of the defendant to guard or warn against the dangerous condition on its property, which was at all times known to the defendant as an open mine shaft marked upon its maps as the new Dixie Dale site.

²In addition, petitioners suggested that Section 846 either did not apply to the circumstances of this case or was unconstitutional as applied. These claims are not before this Court.

tioners' contentions, holding that the district court correctly dismissed their complaint because "Section 846 limits landowner liability for the recreational use of land by persons not expressly invited to do so to liability only for willful misconduct" (Pet. App. 2).

2. Petitioners contend (Pet. 6-9) that their complaint sufficiently alleged that the government's conduct regarding the mine shaft constituted a "willful or malicious failure to guard or warn against a dangerous condition," in violation of Section 846 of the California Civil Code. But willful or malicious misconduct is "*intentionally* doing something, or failing to do something, with the knowledge that injury to another will be a probable result of such act or omission." *Ingram v. Bob Jaffe Co.*, 139 Cal. App. 2d 193, 197, 293 P.2d 132, 134 (1956) (emphasis in original). Here, petitioners' complaint effectively asserted only that the government had "negligently maintain[ed]" the desert area alongside the road (Complaint para. 5) and that it knew of the open mine shaft (*id.* at para. 6). Accordingly, both lower courts correctly concluded that petitioners' claim was barred by Section 846. See also *Phillips v. United States*, 590 F. 2d 297 (9th Cir. 1979); *Gard v. United States*, 594 F. 2d 1230 (9th Cir. 1979), cert. denied, No. 79-65 (Oct. 1, 1979). Further review of this state law question is not warranted. See, e.g., *Propper v. Clark*, 337 U.S. 472, 486-487 (1949); *Estate of Spiegel v. Commissioner*, 335 U.S. 701, 707-708 (1949).³

³*Mamola v. County of San Bernardino*, 94 Cal. App. 3d 781, 156 Cal. Rep. 614 (1979), upon which petitioners rely (Pet. 6), is inapposite. In that case, the plaintiff alleged that the decedent had accidentally driven off a public highway into a ravine because the defendants had failed to mark the end of the highway clearly. No construction of Section 846 was involved. Here, however, petitioners'

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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own complaint acknowledges that the decedent voluntarily drove off the road for recreational purposes and was killed thereafter—precisely the kind of injury for which Section 846 provides that the owner of recreational land shall not be liable. See *Phillips v. United States, supra*, 590 F. 2d at 299.